the distinction between *Loretto* and *Florida Power*, the court noted the Supreme Court's statement in *Florida Power* that "it had not considered 'what the application of *Loretto* . . . would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements.'" *Id.* at 1391 (quoting *Florida Power*, 480 U.S. at 1539). Declaring that "the future is here," the court relied on *Loretto* in finding the FCC action to constitute a *per se* taking. *Id.* at 1395.

The court in *Gulf Power* relied primarily on the fact that the FCC nondiscriminatory access rule was a rule of required acquiescence, like the rule in *Loretto* and unlike the rule in *Florida Power*. As such, the requirement left "no choice" to the utilities but to acquiesce to the presence of the cable companies. *Id.* at 1393-94. The court therefore found the nondiscriminatory access requirement directly analogous to *Loretto* in that the requirement "effectively divest[s] the utility of its right to exclude," and relied also on the fact that "the physical invasion of the utility's poles satisfied the element of permanency as set forth in *Loretto*." *Id.* at 1395.

Like the nondiscriminatory access provision in *Gulf Power*, the nondiscriminatory access provision proposed by the Commission for building owners will effect a taking under the Fifth Amendment.[7] Both provisions

[7] In *Gulf Power*, the court found that the FCC did in fact have statutory authority to effect a taking of the utility's property, partly because the utility was entitled to receive just compensation through adjusted rate-making measures. 998 F. Supp. at 1395-99.

constitute rules of required access. The "poles, ducts, conduits, and rights-of-way" at issue in *Gulf Power* are analogous to the facilities that would be subject to the nondiscriminatory requirement applied to building owners.[8] As is clear from *Loretto*, the physical occupation of such facilities eviscerates the owner's right to exclude no less than does the occupation of an entire farm by a flood. *See Loretto*, 458 U.S. at 427. Moreover, the temporal extent of the occupation in *Loretto*, *Gulf Power*, and under the proposed rule are essentially identical; it is either permanent or lasts until the regulator rescinds the regulation.[9] Not only are there no grounds for distinguishing the taking in *Gulf Power*, if anything, the building owners subject to the Commission's proposed rule would be in a far stronger position to assert their rights under the Fifth Amendment. First, their rights fall squarely within the most protected form of property under the Takings Clause—namely, real property. *See generally Lucas*, 505 U.S. 1027. Moreover, there can be no question here, as there was in *Gulf Power*, of the "partly public, partly private status of utility property." *Gulf Power*, 998 F. Supp. at 1394. Private building owners decidedly do not have—nor have they ever been found to have—the quasi public status of public utilities or common carriers.

[8] Indeed, the rule being considered in *Gulf Power* was Section 224 of the Telecommunications Act, the statute under which the NPRM proposes to require utilities (including LECs) to provide nondiscriminatory access to in-building facilities. *See* NPRM, ¶ 44.

[9] *See* Declaration of Charles M. Haar In Support Of Reply Comments Of National Apartment Association *et al*, IN THE MATTER OF PREEMPTION OF LOCAL ZONING REGULATION OF SATELLITE EARTH STATIONS, p. 6.

In addition to the authority discussed above, there is additional case law demonstrating that the grant of limited access to one or a limited number of service providers cannot be used to override the Takings Clause concerns. Specifically, cases interpreting the mandatory access provisions of the Cable Communications Policy Act ("Cable Act"), demonstrate that the courts will carefully analyze the extent of a landowner's grant of access to communications and power providers to assure that regulations do not expand access beyond that already granted by the landowners or by operation of traditional property law.

For example, in *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992), the Eleventh Circuit was asked to interpret Section 621(a)(2) of the Cable Act, which granted franchised cable companies a right of access to, inter alia, easements "which have been dedicated to compatible uses." Specifically, the court was asked by the plaintiff to find that this provision granted it a right of access to the defendant's private property because the defendant had previously provided access to another cable company, as well as to a telephone company and a power company. *Id.* at 607. The court rejected this argument, reasoning in part that "if Section 621(a)(2) authorized such an occupation . . . this court would have substantial reservations regarding the constitutionality of the Cable Act." *Id.* at 605. Rather, the court found that it could interpret the statute to require access only where the landowner had created a "dedicated easement," which the court understood as being created

"only when the private property owner entirely relinquishes his rights of exclusion regarding the easement so that the general public may use the property." *Id.* at 606.

Thus, the distinction between a private access agreement (such as the decision to allow a cable company access to one's building) and a legally dedicated easement was found to be of constitutional significance by the Eleventh Circuit. Several other Courts of Appeal have interpreted the same or similar provisions of the Cable Act to like effect. *See TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993) (rejecting the plaintiffs broad interpretation of "dedicated" easement as raising "serious questions" under the Takings clause); *Media Gen. Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993) (adopting result of *Cable Holdings*); *Cable Inv. Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989) (construing section 621(a)(2) narrowly to avoid constitutional concerns about a potential taking without just compensation). It is therefore only when a landowner has clearly created a "dedicated legal easement" that a mandatory access rule, such as the nondiscrimination rule proposed in the NPRM, can be applied without raising "substantial constitutional difficulties." Whereas, applying a mandatory access rule to a landowner who had merely entered into private access arrangements with other carriers would "effectively permit[] exactly the same occupation found impermissible in *Loretto*—the permanent physical presence of a franchised

cable company inside private apartment buildings against the express wishes of the property owner." *Cable Holdings*, 953 F.2d at 605. *Cf. Centel Cable Television of Florida v. Admiral's Cove Associates, Ltd.*, 835 F.2d 1359, 1363 n.7 (11th Cir. 1988) (once a developer dedicates easements in a development to utilities, cable operators had right of access to place cable in those easements).

In sum, a general regulation requiring a building owner who makes his property available to a single telecommunications provider to also make his property available to any and all such providers would effect a "permanent physical occupation" of that landowner's property under *Loretto*. The only exception to this proposition would arise in the rare instance where the property owner, under local law, has created a "dedicated" legal easement for all utility and communications providers, *i.e.*, where the property owner has effected a complete cession of his rights to that property. In all other cases, the building owner retains his right under local law to exclude others, which is protected by the *per se Loretto* rule, notwithstanding an invitation and arrangement extended to one or more specific telecommunications providers.

(2) The NPRM's Proposed Extension Of Section 224 To Facilities Located Inside Buildings Will Cause A Taking Of Property

A very similar analysis applies to the Commission's proposed interpretation of section 224 of the Communications Act. *See* NPRM, ¶¶ 36-48. While section 224 technically applies only to public utilities, the proposed rule

necessarily would impact the property rights of the building owners. Section 224 requires utilities (including LECs) to "provide cable television systems and telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or right-of-way that they own or control," and the proposed interpretation would apply this requirement to include "rights-of-way and conduits on end user premises." *See* NPRM ¶ 36, 45.

Thus, by requiring utilities and LECs to provide nondiscriminatory access to facilities located on the premises of building owners, the NPRM's proposal would provide guaranteed access to private property without the permission of the owner. There should be no analytical difference under the Takings Clause between the treatment of the proposed interpretation of Section 224 and the proposed nondiscrimination requirement that would apply directly to building owners. In both cases, the Commission proposes a rule of required access that would allow an unlimited number of telecommunications providers access to the building owners' facilities needed to provide their service, and does so without compensating the owners and without reference to their underlying property rights. In both cases, the proposal will allow for a permanent physical occupation of the building owners' property, and will thereby constitute a *per se* taking under the authority of *Loretto*.

While it is true that in some circumstances a property owner's grant of access to a particular provider or (more likely) group of providers will, under

local law, rise to the level of creating a dedicated legal easement that cedes all property rights of the owner, it will more often be the case under local law that the owner will retain the rights to exclude third parties from these facilities. As a result, any rule that overrides the power of that type of owner to exclude in order to authorize a third party to permanently occupy those facilities will constitute a taking under the Fifth Amendment. As is evident from the analysis in *Cable Holdings* and the related cases discussed above, federal courts will not ignore the underlying legal rights of the property owner simply because the Commission or any other plaintiff urges on it a view of the property owners' rights that is not grounded upon actual state or local property law.

(3) The NPRM's Proposed Extension Of The Rule Requiring Building Owners To Allow Tenants To Place Antennas On Their Premises For Non-Video Services Will Effect A Taking Of Private Property

In 1998, the Commission issued an Order entitled *In The Matter of Implementation of Section 207 of the Telecommunications Act of 1996* ("*OTARD Ruling*"). The *OTARD Ruling* drew a distinction between requiring building owners to allow tenants to install antennas on their rental property, and requiring building owners to allow tenants to install antennas on areas that were common and restricted under the terms of the tenant's lease: with respect to the latter, the Commission recognizes that *per se* takings doctrine applied to protect the property interests of the building owners; with respect to the former, the

Commission judged itself able to prohibit building owners from "lease restrictions that would impair a tenant's ability to install, maintain or use a Section 207 reception device." *OTARD Ruling*, ¶ 20.

We respectfully disagree with the distinction drawn in the *OTARD Ruling*, and therefore also disagree with the NPRM's proposal to extend the same rule to antennas for non-video services. As explained above, the baseline for any Takings Clause inquiry is the nature of the underlying property rights as determined in accordance with "existing rules or understandings that stem from an independent source such as state law." *Lucas*, 505 U.S. at 1030. The Commission simply lacks the power to define, extend, or limit the property interests of landowners. Yet that is exactly what it attempts to do in the *OTARD Ruling*, by prohibiting landlords from making otherwise permissible restrictions—under the terms of the lease as interpreted under local law—on the ability of tenants to install antennas. The ruling states that the "property owner relinquishes its right to control the use of its property when it leases its property," and seeks to support this statement by reference to the Restatement (Second) of Property § 12.2(1) (1977). *See, e.g., OTARD Ruling*, ¶ 19. The Restatement specifically notes that a property owner relinquishes control only "absent a valid restriction." *Id.*, n. 50 (citing Restatement (Second) of Property § 12.2(1) (1977)). The *OTARD Ruling*'s prohibition on lease restrictions is especially incongruous given the fact that the Commission allows that the Takings Clause

would indeed be implicated if the Commission were to require landlords to allow tenants to install antennas in areas that, under the lease as interpreted under local law, are for common and restricted use.

It appears from this argument that the Commission is itself deciding what are "common areas" and what is "rental property" for the nation's tenants and landlords. *See OTARD Ruling*, ¶ 29 (defining leased property as typically including "balconies, balcony railings, and terraces"). Once the Commission has explained the general definitions of what should fall within each category, then it interprets the Takings Clause so as to find that it may prohibit lease restrictions for areas that the Commission has already determined are not, in its view, really subject to the control of the landlord. It reaches this conclusion without regard to the possibility that the landlord and tenant may well have agreed in the lease that the landlord in fact retained such control over those areas of the premises. This approach is completely at odds with a fundamental principle that the Takings Clause is not itself a source of substantive property rights, but rather a constitutional protection designed to preserve those rights against acts of the Government.

Properly analyzed, the application of Section 207 to landlords and tenants would give rise to a taking of the landlord's private property unless the installation is going to take place on property on which the landlord has granted the tenant the right to place an antenna for the specified purposes. But in such a

situation the need for a requirement restricting the landlord's ability to prohibit such an installation is rendered moot by the fact that, under state law and the terms of the lease, the tenant will by definition already have such a right. In other words, the very nature in which the Takings Clause operates eliminates the need for any Section 207 prohibition to be applied against landlords, absent, of course, express statutory eminent domain authority and actual payment to the building owners of their just compensation.

(C) Even If Analyzed Under The Multi-Factor Balancing Test Applied To Regulatory Takings, The Proposed Rules Would Effect A Taking Of Private Property From The Building Owners

It is frequently stated that the central purpose of the Takings Clause is to prohibit the unfair distribution of the costs of government. *See* Laurence H. Tribe, American Constitutional Law 9-6 (2d ed. 1988); Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1218-24 (1967). This purpose is partly served through the *per se* takings doctrine, which provides an absolute protection against any cost-shifting that infringes upon a property owner's rights to exclude others from his property. But it is in the realm of regulatory takings, where the Takings Clause is applied more expansively to determine when the regulatory constraints and burdens on private property go "too far," that the central purpose of preventing the unfair distribution of the costs of government

is most clearly seen. *See, e.g, Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2154 (1998); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922),

It is widely recognized that there is no "set formula" for determining whether or not a regulatory taking has occurred. *E.g., Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Indeed, in some cases, a regulatory taking will be found simply because the regulation is grossly unfair, violating basic principles of justice and fairness. *See Eastern Enterprises*, 118 S. Ct. at 2146 (plurality). The factors to which courts most often turn, however, are the extent to which the regulation interferes with investment backed expectations, the economic impact of the regulation, and the nature of the government act involved. *See Connolly v. Pension Ben. Guar.*, 475 U.S. 211, 224 (1986).

As recounted above, the stated purpose of the Commission's proposals is "to help ensure that competitive providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments." NPRM, ¶ 1. In adopting this purpose, the NPRM implicitly suggests it has the authority to enhance the value of these "competitive providers" at a cost borne primarily by the owners of those "multiple tenant environments." Indeed, the contradictory points made in the NPRM about the willingness of building owners to make their facilities freely available to all providers belies the true nature of the NPRM. The Commission first recites that it has received complaints from one of the nation's most

successful non-incumbent telecommunication's providers about having to pay high prices for access to building facilities, and then notes later that "competitive telecommunications carriers have successfully negotiated building access agreements in many instances." NPRM, ¶ 31. What the NPRM fails to recognize is that the ability of building owners to capitalize on the value of their facilities and their access to tenants constitutes a legitimate return on their investment, and is no less a part of their property interest than their ability to charge monthly rent.

Indeed, the NPRM's commitment to provide telecommunications providers with free access to building facilities overlooks the fact that building owners themselves have both the right and the ability to enter into the telecommunications market. The economic opportunities that are created through the expansion of communications networks are not the exclusive domain of any one industry or interest group, and while other commenters will more fully elaborate on the economic policy concerns raised in the NPRM, it is critical that building owners be recognized as constitutionally entitled to preserve the substantial value that their property investments have in relation to provision of telecommunications services.

The Commission need look no further than the actual recent developments in the real estate industry to observe that owning a multiple tenant building is no longer simply a business of leasing space to tenants, and

allowing those tenants to use that space in any reasonable manner. *Cf. OTARD Ruling*, ¶ 19, n. 50. Instead, building owners now often seek to provide a comprehensive bundle of services to their "customers," including, at least in some instances, the provision of telecommunications services. Examples of this include real estate businesses that have established joint ventures with telephone carriers to establish a consumer points rebates system or to provide a bundled internet/telecommunications service, that have decided to directly invest in a fiber optic backbone to provide delivery of telephony, high-speed Internet/intranet, and video services to tenants, or that have simply created a telephone service company to provide services directly to tenants on an independent basis.[10]

The critical inquiry in demonstrating the existence of a reasonable investment-backed expectation in a takings cases is whether the rights of the property owner were implicitly limited by a governmental power to promulgate and apply the regulations at issue and, therefore, implicitly excluded the justifiable expectation that the government would *not* be able to promulgate and apply the regulatory acts. *See, e.g., Monsanto*, 467 U.S. at 1005. As the above discussion in Section II (A)(1) demonstrates, there is no basis for the Commission

[10] Additional evidence of the changing nature of the real estate business, and its shift to a more "service-based" approach, can also be seen in the fact that the Internal Revenue Service has agreed that income earned from providing telecommunications services to tenants will be considered "good" income under the tax code's REIT rules—meaning it will be treated identically to rental income and other traditional sources of REIT revenue. *See, e.g.*, Priv. Ltr. Rul. 99-17-039 (April 30, 1999); Priv. Ltr. Rul. 94-52-032 (September 30, 1994).